1957

Earl D. Tanner v. W. C. Lawler et al : Brief in Opposition to Appellants' Petition for Rehearing

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

EARL D. TANNER,
Plaintiff and Respondent.

vs.

W. C. LAWLER and LAURA M. LAWLER, his wife,
Defendant and Appellants.

vs.

WALTER H. REICHERT,
Defendant and Counterclaimant as to Earl D. Tanner, and Plaintiff against George Beckstead as Sheriff of Salt Lake County, Utah, and Appellant,

vs.

GEORGE BECKSTEAD, as Sheriff of Salt Lake County, Utah,
Defendant in Intervention and Respondent.

Case No. 8518

BRIEF IN OPPOSITION TO APPELLANTS' PETITION FOR REHEARING

EARL D. TANNER
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STATEMENT OF FACTS

In appellant's brief in support of their petition for

rehearing they have raised seven points of alleged error. It is the position of the respondents that as to all of the points raised in said petition, save and except a portion of Point One and Point Five, the matters presented are those which were argued in the briefs heretofore filed and require no further discussion other than a reference to the arguments set forth by these respondents in the Respondents Brief heretofore filed herein. The portion of Point One of appellant's said brief to which this answering brief is addressed reads "The court erred in stating that the appellants have furnished a stay bond on the appeal, * * *" and the said Point Five reads as follows "The court erred in holding that the appellants gave a stay bond in order to retain possession of the property here involved."

The pertinent facts are these: On March 26, 1956, appellants filed their notice of appeal from the judgment below (R. 93). The operative portion of said notice reads as follows:

> "You and each of you will take notice that W. C. Lawler and Laura M. Lawler, his wife, defendants above named, and Walter H. Reichert defendant and counterclaimant as to Earl D. Tanner and plaintiff against George Beckstead, as Sheriff of Salt Lake County, Utah, above named, hereby appeal to the Supreme Court of the State of Utah from a judgment in favor of the plaintiff, Earl D. Tanner and defendant in intervention, George Beckstead as Sheriff of Salt Lake County, Utah, which judgment was entered in this action o nthe 17th day of March, 1956. *This appeal is taken from the whole of said judgment.*" (Italics added.)

On the same day and, presumably, at the same time, two bonds were filed by appellants. The first of said bonds was denominated a "Cost Bond on Appeal," was in the amount of $300.00 and was filed on behalf of all three appellants, Walter H. Reichert, W. C. Lawler and Laura M. Lawler. The second bond was denominated "Supersedeas Bond on Appeal." Both bonds were submitted to the trial court and were approved by Judge David T. Lewis in an ex parte examination of said bonds. A notation of approval is found in the upper left-hand corner of each bond (R. 96 and 98). Said Supersedeas Bond reads as follows:

> "KNOW ALL MEN BY THESE PRESENTS, that we, Julius C. Reichert and Sylvia Reichert, both of Salt Lake City, Utah, are held and firmly bound unto EARL D. TANNER in the sum of ONE THOUSAND DOLLARS ($1,000.00), to be paid unto the said EARL D. TANNER, his executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators firmly by these presents.
>
> "WITNESS our hands this 24th day of March, 1956.
>
> "The condition of the above obligation is such that whereas on the 17th day of March, 1956, a judgment in the sum of $500.00 and costs was rendered against Walter Reichert and in favor of Earl D. Tanner in a certain action in the Third District Court of Salt Lake County, Utah, which action is numbered 107508 and entitled, 'Earl D. Tanner, Plaintiff, vs. W. C. Lawler, Laura M. Lawler, his wife, Defendants, vs. Walter H. Reichert, Defendant and Counterclamant as to Earl D.

Tanner and Plaintiff against George Beckstead, as Sheriff of Salt Lake County, Utah, vs. George Beckstead, as Sheriff of Salt Lake County Utah, Defendant in Intervention; and

"WHEREAS, the said Walter Reichert is about to appeal to the Supreme Court of the State of Utah from the judgment so rendered against him; and

"WHEREAS, the said Walter H. Reichert desires to stay execution upon said judgment pending the appeal;

"NOW, THEREFORE, if the said judgment is affirmed or the appeal dismissed, then and in such case the said Walter H. Reichert will pay in full the amount of said judgment and costs, interest and damages for delay, then and in such case this undertaking shall become null and void, otherwise to remain in full force and effect.

"The undersigned hereby submit himself and herself to the jurisdiction of the Third District Court of Salt Lake County and irrevocably appoint the Clerk of the Court as his and her agent upon whom any papers affecting his or her liability may be enforced on motion without the necessity of an independent action."

At all times during the course of this appeal Elias Hansen has been the attorney, and the sole attorney, for all three of the appellants.

The following statements, though true, do not appear in the record of this action. Since they bear on the subject of this brief and there has been no occasion for setting them forth heretofore, it is the view of respondents that these allegations should be placed before this court

in order to aid in its interpretation. If the court feels that they are of no significance, even if assumed to be true, it will not be necessary to have them examined by a trier of facts. If, on the other hand, this court deems them to be of significance, if true, an examination of their verity by a trier of facts may be in order.

At or about the time of the filing of the aforementioned notice of appeal and bonds, plaintiff telephoned the attorney for the three appellants and requested that some mutually agreeable arrangements be made for the restitution of the premises to his possession in compliance with the judgment as to which said attorney had indicated an intent so to appeal. Said attorney advised the plaintiff that in no event would arrangements be made to restore said property to his possession or to provide that the rentals being paid under contract to the appellant Reichert by the appellant Lawlers be paid, during the course of said proposed appeal, to plaintiff rather than Reichert. Said attorney advised plaintiff that he was not entitled to possession during the appeal period, and, were he to attempt to secure possession during that period it would be wrongful and he would be required to defend an action for a very substantial sum of money for dispossessing appellants.

In light of this threat and of appellants firm statement that possession was to be maintained during the appeal period, the plaintiff, upon receipt of notice of appeal, examined the two bonds filed herein and, in an ex parte conference, asked the trial court, which had

approved said bonds in an ex parte conference with appellants' counsel, whether it was the intent of the court when it approved said bond, that the supersedeas bond operate to stay the whole of the judgment appealed from by Reichert. Plaintiff was advised that that was the understanding of the said court when it approved said bond. Plaintiff then advised the court that, in view of the representations made to plaintiff by counsel for appellant Reichert as to said appellant's substantial financial capacity and in view of the fact that the $9,078.81 paid to the sheriff for said appellant was held by the sheriff and refused by said appellant and would be so held pending the appeal, plaintiff waived any objection to the amount of the supersedeas bond.

Respondent Tanner made no further effort to secure the possession of said premises and has been out of their possession up to and including the present time. During a portion of the period of the appeal, respondents Lawlers have been in possession of the premises as tenants of respondent Reichert under a written contract requiring them to pay the said Reichert rentals of $75.00 per month. Respondent Tanner believes and alleges that appellants Lawlers have continued after the expiration of said written rental agreement to possess said premises as the tenants of said appellant Reichert. Whether rentals have been paid from the Lawlers to Reichert under this arrangement has not yet been determined by any court.

It was stipulated between the parties here (R. 62) that appellant Reichert was the person in possession of the disputed premises and that he maintained his possession through the appellants Lawlers. This was found to be the fact and judgment was rendered accordingly.

STATEMENT OF POINTS

POINT ONE

THE COURT DID NOT ERR IN STATING THAT REICHERT HAS DEPOSITED A STAY BOND IN ORDER FOR THE LAWLERS TO RETAIN POSSESSION OF THE PROPERTY PENDING THE APPEAL.

ARGUMENT

This court, with a clear insight into the actual results of the facts shown by the record, made the following statement under Point (4) of the majority opinion:

> "Here it is evident that the money judgment against the Lawlers is not collectable. There are liens for more than $7,000.00 against any interest they may have in real property in this county and the mortgage foreclosure judgment was allowed to go to sale. Reichert has deposited a stay bond in order for the Lawlers to retain possession of the property pending the appeal but no such bond was deposited for the Lawlers. If a money judgment is awarded only against the Lawlers then Reichert's stay bond will have the effect of preventing Tanner from obtaining possession of the property pending this appeal but he will be unable to collect from such bond the judgment against Lawlers, although as Reichert's tenants the Lawlers may voluntarily pay him the rental value of the property during that time."

Since Reichert was maintaining his possession of the disputed premises through tenants who were, for this purpose, actually tenant-agents, a dispossession of the Lawlers would have been a dispossession of Reichert. If the supersedeas bond is to be held to have the effect *which it has been accorded by the conduct of all of the parties to this action,* to-wit, a stay of restitution, a dispossession of Reichert by the dispossession of his tenant-agents, would have been wrongful and would have subjected both the sheriff and Tanner to damages. That Reichert so interpreted the situation is clear from his conduct and warning.

The body of the supersedeas bond contains inaccuracies and ambiguities. Given one construction, the operative portion of said bond would have the effect of staying enforcement of such portion of the judgment as was being appealed from, and, given a different interpretation, would stay only the money judgment. The burden of that uncertainty must be borne by the party furnishing the bond for approval and *acting under the bond to retain possession of the premises for the whole period of the appeal.* Approval of the bond superseded and set at naught the whole of the judgment against Reichert. The question now before this court is whether it can be held, in light of the facts of the case that the "supersedeas bond" furnished as such and *so denominated* by appellant Reichert, viewed in light of the surrounding

circumstances and his continued possession of the premises, can be said not to have been deposited in order to keep Tanner from the possession of the premises and can he held not to have kept Tanner from said possession.

Rule 73 (d) U. R. C. P. provides for the furnishing of a supersedeas bond. This rule must be read in conjunction with the provisions of Rule 62 U. R. C. P.. Said Rule 73(d) is verbatim with Rule 73 (d) of the Federal Rules of Civil Procedure except for the use of the word "sheriff" in place of the word "marshal." It provides as follows:

> "SUPERSEDEAS BOND. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when

> such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay."

The effect of a supersedeas bond in the state of Utah has been settled by this court in the case of *Smith* vs. *Kimball,* 70 A.L.R. 101, 76 U. 350, 289 P. 588, which holds as follows:

> "The judgment in the main action, from which the appeal was taken and which was superseded, was, in legal effect by the appeal and supersedeas, vacated and rendered inoperative, the authority of the court below terminated and prevented from further proceeding with respect to any matter involved in the subject-matter of the appeal, or to take any action which amounted to an execution or enforcement of the judgment, or which affected the subject-matter of the appeal, and the case left with all its incidents precisely as it stood before the rendition of the judgment in the court below and became one of cognizance in this court on a trial de novo on the record; and, though the judgment in the district court was final judgment for purposes of the appeal, yet, because of the appeal and the supersedeas, was not a final determination of the rights of the parties in and to the subject-matter of the litigation, until a determination by this court." (Citing statute and cases.)

In that case, however, the court stated that "Neither the form or the sufficiency of the supersedeas to operate

as a full and complete stay is questioned." For this reason said case cannot be held to be determinative of the issues in the present case, but the rule as to the effect of the supersedeas is important.

As is set forth in Volume 7, *Moore's Federal Practice,* 2nd edition at Page 1370, in a discussion of Rule 62 (d), Federal Rules of Civil Procedure (which is the same as Rule 62 (d) of the Utah Rules of Civil Procedure), it is pointed out that the stay is effective *when the supersedeas bond is approved by the court* and that execution issued thereafter is wholly irregular and may be quashed either in the court below or by the court of review. Four opinions of the United States Supreme Court are cited by Moore to this effect. Since it is not anticipated that this proposition is controverted, said citations will not be repeated here.

The supersedeas bond filed herein is composed of two parts, the recitals and the operative portion. The first recital refers to the judgment "rendered against Walter Reichert and in favor of Earl D. Tanner in a certain action in the Third District Court of Salt Lake County, Utah which action is numbered 107508 and entitled 'Earl D. Tanner, plaintiff, vs W. C. Lawler, Laura M. Lawler, his wife, defendants, vs. Walter H. Reichert, defendant and counterclaimant as to Earl D. Tanner * * *.'" It characterizes said judgment as being a judgment in the sum of $500.00 and costs. This characterization is in error for the reason that the judgment there referred to (and appealed from), is a judgment in the sum of $500.00 and costs *and restitution.*

The next recital states that the said Walter H. Reichert is about to appeal to the Supreme Court of the State of Utah from the judgment so rendered against him and the next recital states that said Walter H. Reichert desires to stay execution upon said judgment pending the appeal. The judgment referred to, appealed from, and stayed, is the judgment for restitution as well as damages.

The operative portion of said supersedeas bond reads as follows:

> "Now, therefore, if the said judgment is affirmed or the appeal dismissed, then and in such case the said Walter H. Reichert will pay in full the amount of said judgment and costs, interest and damages for delay, then and in such case this undertaking shall become null and void, otherwise to remain in full force and effect."

It is the contention of the respondent Tanner that the operative portion of said supersedeas bond controls, and when approved, stays the *whole judgment appealed from,* was understood by all parties to this action to be controlling, was treated and acted upon by all parties as controlling, and as having the effect of staying the entire judgment insofar as Reichert was concerned. Had Reichert intended to stay only the money judgment he could easily have said in the bond "only the money judgment is to be stayed."

The essential elements of an effective supersedeas bond are set forth in Moore's Federal Practice, 2nd Edition, Volume 7 at Page 3175 as follows:

> "A supersedeas bond must be conditioned (1) for the satisfaction of the judgment in full together with costs, (2) interest and (3) damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and (4) to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellant court may adjudge and award."

It is apparent from the operative portion of the supersedeas bond set forth above that these conditions were fully met, and that the judgment against Reichert was thereafter, as a matter of law, superseded and enforcement stayed.

It was within the power of the appellant Reichert to clearly state that the judgment concerned in the supersedeas bond was the money judgment only, if that was his intent, and not to furnish a bond which, from the operative portion of it, construed together with the notice of appeal, would appear to bring into operation the legal effect set forth in *Smith* vs. *Kimball,* supra, as to the whole of the judgment against Reichert.

It has been argued that the amount of the bond is of some significance. If this regard it should be noted that a $300.00 bond was filed and that the supersedeas bond, being in addition to the cost bond, was in an amount which could, in view of the accelerated appeal provisions in this kind of case, be expected to cover damages on appeal in event treble damages were disallowed. In addition it must be considered that the sum of $9,078.81 was still on deposit with the sheriff and subject to being used to satisfy any judgment against the appellant Reichert

herein. The waiver by the respondent Tanner of a challenge to the sufficiency of the *amount* of the bond should not be held to constitute a waiver as to the sufficiency of its effect. That he construed the bond to have the effect of staying restitution cannot be doubted, for he made no further effort to obtain restitution of the premises after the telephone conversation with respondants' counsel, the bond, and the ex parte discussion with the court which had approved the bond ex parte.

In the event this court feels that said bond did not have the effect of staying process to obtain possession of the premises by a writ of restitution, it must inquire whether the appellant Reichert has waived or is estopped from claiming that the bond has limited application. Presumably these determinations would require an additional hearing. Such a hearing could establish whether the Lawlers have paid rent to Reichert during the period of appeal or during any portion of said period, and could fix damages for withholding possession from Tanner both as to loss of use and as to property damage. If it be held that said bond did not stay Tanner from repossession of the premises during the appeal, said additional hearing could provide for a determination as to who is obligated to pay the fair value of the use of the premises during the period of the appeal. Certainly, under the circumstances of this case, Tanner should not in any event be wholly deprived of the value of the use of the premises during the period of the appeal.

CONCLUSION

For the reasons set forth above the respondents respectfully urge this court to deny the petition for rehearing filed hereby by the appellants. The original desision of this court as reported is accurate, just, and proper in each and every respect.

Respectfully submitted,

EARL D. TANNER

Attorney for Respondent